United States Court of Appeals

for the Second Circuit

APPENDIX

74-2149

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 74-2149

Connecticut Transportation Coalition, State of Connecticut National Association for the Advancement of Colored People Conference of Branches, Connecticut River Ecology Action Corporation, and Charlotte Kitowski, Thomas Sharpless, Ben Andrews for themselves and all others similarly situated

Plaintiffs

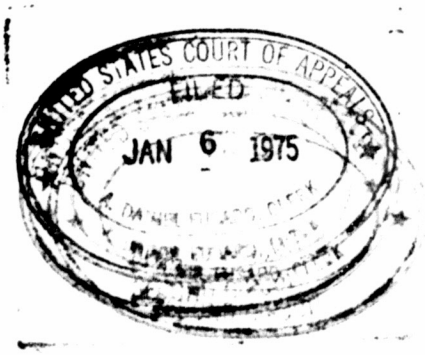
v.

Thomas J. Meskill, Governor of the State of Connecticut, Joseph Burns, Commissioner of the Department of Transportation of the State of Connecticut, and Nathan Agostinelli, Comptroller of the State of Connecticut

Defendants

JOINT APPENDIX

BRUCE MAYOR
190 TRUMBULL STREET
HARTFORD, CONNECTICUT



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I N D E X

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT TRANSPORTATION COALITION, STATE OF CONNECTICUT NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE CONFERENCE OF BRANCHES, CONNECTICUT RIVER ECOLOGY ACTION CORPORATION, and CHARLOTTE KITOWSKI, THOMAS SHARPLESS, BEN ANDREWS for themselves and all others similarly situated,

Plaintiffs

-vs-

Civil No. H74-70

THOMAS J. MESKILL, GOVERNOR OF THE STATE OF CONNECTICUT, JOSEPH BURNS, COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF CONNECTICUT, and NATHAN AGOSTINELLI, COMPTROLLER OF THE STATE OF CONNECTICUT,

Defendants.

RULING ON PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF AND DEFENDANTS' MOTION TO DISMISS

The plaintiffs in this action request that the Court enjoin the Governor of the State of Connecticut and other named state officials from authorizing the expenditure of any further monies out of the Public Service Tax Fund or the mass transportation portion of the Transportation Fund, on the existing "People Mover" contract, so-called, with the Ford Motor Company (Ford). This latter contract, dated November 15, 1973, required Ford to design, fabricate, install and

test-operate an automatically controlled transportation system at the Bradley International Airport. The plaintiffs request further that the Court order the State Comptroller to correct the state budgeted account entries, so that they will reflect no expenditure has been made for this project out of the funds earmarked by the General Assembly for mass transportation; and further, that said injunction restrain the defendants from proceeding with the project, until both an environmental impact statement and an energy consumption statement have been prepared and they have otherwise conformed to legal requirements.

The Court issued a show cause order requiring the defendants to answer and state why a preliminary injunction should not issue; whereupon they promptly responded through the Attorney General by moving to dismiss the complaint, on the grounds that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted. At the hearings, both parties submitted considerable evidence in the form of testimony and exhibits related to the respective merits of their claims. The Court finds that the plaintiffs' allegations do not state a claim upon which relief can be granted. The Court accordingly denies relief and dismisses the action pursuant to Rule 12(b)(6), Fed. R. Civ. P.

The named plaintiffs include the Connecticut Transporation

Coalition, a self-styled group described as "individuals and organizations dedicated to sound ecological determination and rational mass transportation planning," the Connecticut NAACP, the Connecticut River Ecology Action Corporation, and several individuals affiliated with the aforementioned groups. The hearing disclosed that these plaintiffs sharply disagree with the policy decision of the Transportation Department and the Governor to expend 4.5 million dollars from the State's transportation fund for this demonstration test-project at Bradley Field.

It is not the function of the judicial branch of the federal government to evaluate the practical wisdom or feasibility of controversial state policy decisions. To do so would involve the Courts in passing upon the merits of executive political decisions. It is the Court's responsibility to determine whether or not federal statutory law has been infringed or whether the federal constitutional rights of the plaintiffs have been violated.

Plaintiffs' Claims

The complaint asserts several alleged violations of federal statutory law and regulations together with a claimed invasion of equal protection and due process rights under the fourteenth amendment; in addition, it charges several acts of

unlawful state action. It alleges that the Ford contract was entered into under the purported authority of Conn. Gen. Stat. §§ 13b-34, 13b-35, and 13b-36, and was illegally funded out of the Public Service Tax Fund, pursuant to Conn. Gen. Stat. § 16-338. The statutes in question authorize the use of one-fifth of the annual income from this tax upon utilities, which it is estimated will be 10.5[1/] million dollars for the fiscal year 1973-74, for use in financing, directly or through the payment of interest, principal, and premiums on bonds, mass transportation activities undertaken by the State Department of Transportation. During the fiscal year beginning July 1, 1974, the plaintiffs claim moneys from the Public Service Tax Fund will be deposited into the General Transportation Fund, with 10% being allocated for mass transportation purposes. They estimate that 16 million dollars will be so assigned during the next fiscal year, 1974-75, of which amount approximately 3 million dollars has already been earmarked for the completion of the controversial "People Mover Project." They argue that such a large allocation of these budgeted moneys is unlawful, because it is contrary to legislative intent.

The plaintiffs present several specific allegations of statutory illegality, in their shot-gun attack upon the whole project. Their allegations of unlawful conduct against the defendants, include the following: (1) that Commissioner

Burns exceeded his statutory authority under Conn. Gen. Stat. § 13b-34; (2) that he failed to comply with Conn. Gen. Stat. § 13b-35 requiring express findings before entry into said contract; (3) that the absence of an environmental impact statement violated Executive Order No. Sixteen; (4) that there was no prior assessment of potential energy consumption in violation of Executive Order No. Nineteen; (5) that the contract was let without competitive bidding in violation of Conn. Gen. Stat. § 4-112; (6) that they refused to apply for a federal grant, purported to be available for urban mass transit projects, because they wished to avoid the necessity of filing an environmental impact statement; (7) that they refused to apply for a federal grant under the Airport and Air Development Act; (8) that they avoided financing the project by the use of bonds, available under Conn. Gen. Stat. § 16-338, in order to avoid the security of bonding counsel as to its legality; (9) that they failed to file an environmental impact statement, as required by the Governor's Executive Order No. Sixteen; (10) that they failed to procure a potential energy consumption statement under the Governor's Executive Order No. Nineteen; (11) that they failed to indicate the existence of the project on the State's 1973-74 Unified Work Program required by federal regulation to be filed by the State, because had it been filed, it would have been likely to have been found environmentally unsound; (12) that

the State acted with undue haste in entering into the contract, prior to the creation by the State Department of Environmental Protection of a State Implementation Plan, in order to avoid a contrary finding on whether the project violated federal clean air quality standards; (13) that aside from the environmental claims, the plaintiff Andrews asserts that the minority group low income families which he represents, (including the NAACP) are in immediate need of improved public transportation and that the expenditure of 20% of the limited funds available on the proposed experimental project outside any urban area deprives them of equal protection under the law.

The plaintiffs' testimony has made it clear to the Court, that their basic concern was that of policy. Mr. Andrews of the NAACP indicated that 75% of the minority group live and work in urban areas. He explained that no demonstration project would be required to convince those people, who have inadequate transportation, to use this type of transportation. (Tr. 375-6).

In reply to an inquiry by the Court, he responded,

> "[W]e could conceivably see this in the future, but in terms of immediate needs . . . it is inappropriate to do this until we get to a time of good prosperity, and all other needs have been met. At that time it would seem fitting to experiment in that regard." (Tr. 381-2).

The Court also asked Mr. Sharpless, who appeared for

the Connecticut River Ecology Group, a similar policy question, to which he responded:

> "[A]re you asking . . . if I feel that it is all right or legitimate to forgo meeting the standards of May 1975, for perhaps a longer term benefit?" (Tr. 393).

The Court answered in the affirmative and he replied,

> "I agree with that. I would go along with that policy, if it seemed like a wise policy." (Tr. 393-4).

Mrs. Kitowski, a registered nurse, complained of inadequate transportation in the urban areas on Sundays, holidays or late at night. Her concern focused upon the seeming uneven priority of using such a large sum for "mass transportation money" on a system which would serve a very small number of people at a time when there were critical unmet needs. (Tr. 401-4).

Facts

The initial decision to consider building the "Personal Rapid Transit" (PRT) System at Bradley International Airport originated within the Connecticut Department of Transportation around May or June, 1973. The use of the descriptive term "People Mover" broadly encompassed the suspended monorail type car, the air cushion type vehicle using compressed air chambers to lift the vehicle from the surface and move forward with minimum friction and the rubber tired vehicle designed to travel within the confines of a concrete guideway

(Plaintiffs' Exhibit 1). The basic concept of the unit is liken unto a computer controlled horizontal elevator, which can be electrically propelled and demand-activated by the passenger's pressing a button. With the rapid expansion of the public's use of Bradley International Airport, there has existed a long-felt need for an off-site parking lot, which was planned to accommodate parking for 1500 cars, at a location three-fourths of a mile from the airport terminal. The transportation department decided that this open location and need afforded a feasible opportunity to experiment with a test operation for an automated transportation system in a tightly controlled environment, without uprooting people and businesses; and which could be prospectively evaluated for use as a practical and effective mode of widespread intra-city transit use or adapted to transport people from suburban areas to the city. (Tr. 313). It was the considered opinion of state officials, that if actual use of the proposed unit disclosed an impractical design or if experience indicated other factors which were not readily adaptable to urban use, these could be modified or eliminated. If this plan were successfully accomplished, Connecticut could then be the first state in the Nation to demonstrate an effective urban use of an automated transit system. Such success would justify its applying for and receiving, a priority-grant of substantial federal funds. The appropriation of these moneys is expected

in the immediate future, for the construction of large-scale intra-city urban transit systems. (Plaintiffs' Exhibit 2).

On June 22, 1973, the State Transportation Department solicited manufacturers' proposals (PX-3) from several experienced designers of such equipment, outlining the basic criteria upon which proposals might be submitted. It required that such proposals conform to all applicable state and federal laws, regulations and executive orders and that they must be environmentally sound. A preliminary presentation was to be submitted within three weeks and a firm price for the overall project was an essential bid requirement. Seven prospective manufacturers responded (Plaintiffs' Exhibit 6) with proposals embodying varying types of electrically powered units, including: (1) Boeing Aerospace Company of Seattle, Washington; (2) Bendix Dashveyor Conveyor of Ann Arbor, Michigan; (3) Ford Motor Company of Dearborn, Michigan; (4) North American Monorail Corporation of Utica, New York; (5) Rohr Monorail System Division of Cape May, New Jersey (jointly with Connecticut Mass Transit Corporation of Bloomfield, Connecticut); (6) Transportation Technology, Inc. of Denver, Colorado; and (7) Westinghouse Electric Corporation of Hartford, Connecticut.

An ad hoc evaluation committee of five members within the transportation department was appointed by Acting Commissioner Shugrue.[2/] (Tr. 228-230). It included himself, his

Executive Aide Spaulding, Deputy Commissioner Drake, in charge of Planning & Research, Deputy Comissioner Pease, in charge of the Bureau of Rail and Motor Carriers Services, and Deputy Commissioner LaRosa of the Bureau of Aeronautics. The entire committee analyzed all of the proposals. Ford was unanimously selected to provide the design, construction, construction inspection, system testing and checkout of the proposed unit; and as a part of the contract, it agreed to operate the system for one year and to teach state employees to maintain, operate and carry on thereafter. The design and construction was considered unique and the automation features were covered by twenty or more Ford patents. It seemed impractical and unwise to separate the design and construction, because of the unique operational features of the system. (Tr. 222). The guideway within which the cars would travel was elevated and is described as being adaptable to an urban setting, where the installation would be elevated, so as to avoid conflicts with existing city facilities. (Plaintiffs' Exhibit 6). The variety of systems submitted included some having the capability of travelling as fast as 150 miles per hour, whereas the one finally selected travelled at an average speed of 30 miles per hour, which could be increased with an adaptation to the system. (Tr. 250). The selected shuttle system included three stations, the terminal building, the hotel area, and the car parking lot. The easterly end of the 3600-foot guideway

commenced at ground level, and 2200 feet of the system consisted of elevated guideway. Commissioner Shugrue stated that the project might have qualified for federal funds as a demonstration project, but no such funds were then available. (Tr. 205-8). He did not know whether or not the State Department of Transportation was eligible for Federal Urban Mass Transportation Funds for such a project after March, 1973. He admitted that the department did withdraw an application for federal funds to prepare a Master Plan at Bradley Airport in the fall of 1973, but the reason was not to evade the requirement of an environmental impact report for this proje t. (Tr. 238-241).

It is presently estimated that 2.5 million passengers presently use the Bradley Airport each year for travel; and an additional 7.5 million well-wishers travel there to see friends or acquaintenances at the time of their flight departure or deplaning, making a total of 10 million patrons a year. (Tr. 219). It was agreed by the Commissioner of the Department of State Transportation that this pilot program would provide a real opportunity to test public appraisal of this method of transportation.

The plaintiffs claim that when this project was planned and approved, the State was aware that area traffic strategies would likely be imposed to reduce automobile traffic at least 20% in the capitol region by 1975. (Tr. 340-343); and that

this project would aggravate the condition by bringing an estimated 10 million people annually to the airport location. (Tr. 345). The glaring weakness in the plaintiffs' argument is that this is the estimated patronage already using Bradley Airport, without the existence of the proposed "People Mover" and prior to the construction of the newly planned parking lot. To what extent, if any, traffic volume might be increased is very speculative, to say the least. It is the existing patronage to whom the State would expose this new mode of travel, so that an evaluation of its actual public acceptance can be determined for future urban purposes.

On August 24, 1973, the State Department of Transportation requested the approval of said project by the State Bonding Commission, at a cost not to exceed 4.5 million dollars. The submission included the "express finding" of the Commissioner as to the need for the project, (Plaintiffs' Exhibit 9) as required in Conn. Gen. Stat. §§ 13b-34, 13b-35. When the Commission approved the project on August 23, 1973, Executive Order No. Nineteen relating to energy efficiency (Plaintiffs' Exhibit 15) had not been issued (October 2, 1973) and was not a factor in its decision. (Tr. 297-9). The Bonding Commission approved a resolution authorizing the project and provided therein, pursuant to Conn. Gen. Stat. § 16-338, that payments could be from alternative sources, namely, the Public Service Tax Fund, the sale of bonds or bond anticipation notes, the method to be subsequently decided by the Commission (Plaintiffs' Exhibit 11).

The Attorney General approved the documents as to form; and Assistant Attorney General Kichuk represented to the Court that this meant, that as far as legality was concerned, it was proper and within the law. (Tr. 261-2). The newly appointed Commissioner Burns gave final approval to the project (Tr. 318-9) and a design and construction contract was then executed on November 15, 1973, with Ford. Work was commenced immediately and continues to the present time.

The contract provided that it could be cancelled at the convenience of the State or for non-performance of the agreement. However, if it was terminated for the State's convenience, the latter would be subject to a termination claim by the manufacturer, covering Ford's outstanding contract commitments in addition to expenditure costs to date. (Tr. 88). At the time of the hearing, $78,000 had already been spent up to February 26, 1974; and 15.2% of the work which included the $78,000 figure was billable as of March 22, 1974, in the total amount of $302,000. (Tr. 97).

Legal Discussion

The Court will first sift out and consider the federal statutory and constitutional issues raised by the plaintiffs. They argue that the defendants are obligated under the Governor's Executive Order No. Sixteen, (Plaintiffs' Exhibit 7),

filed October 4, 1972, to prepare an environmental evaluation statement concerning this project as a condition precedent to the approval and the subsequent execution of a construction contract. They claim that the State committed itself to this policy pursuant to federal statute 23 U.S.C. § 109(h). This latter law actually requires the Secretary of Transportation, after consultation with the appropriate federal and state officials, to submit to Congress for approval, and thereafter promulgate guidelines applicable to all proposed federal-aid highway projects. These guidelines are designed to assure full consideration of the "possible adverse economic, social and environmental effects relating to any proposed project on any federal-aid system," and are to apply to "all proposed projects with respect to which plans, specifications, and estimates are approved" by the Secretary of Transportation. The State of Connecticut has never applied for any federal aid for the project being challenged, therefore there exists no basis for applying this federal statute, § 109(h), in an attempt to bolster the plaintiffs' legal claims.

On June 1, 1973, pursuant to 23 U.S.C. § 109(h), the Secretary of Transportation promulgated Policy and Procedure Memorandum 90-4 (PPM 90-4), which required each state highway agency to develop an "Action Plan" describing the "processes to be followed in the development of Federal-Aid highway projects." (PPM 90-4, para. 6(a)). Connecticut thereupon

developed and submitted a Plan of Action for Connecticut's Environmental Responsibility (PACER). (Plaintiffs' Exhibit 8A) This was approved by the Governor and the Regional Highway Administrator on October 5, 1973.

PACER does make reference to Executive Order No. Sixteen, but there is nothing therein which establishes any contractual relationship between the state and federal sovereignties, which guarantees Connecticut's eligibility for federal funding of present or future projects. It is nothing more than an "Action Plan," which sets forth state policy. It does not obligate the federal government to commit funds for any Connecticut highway or other project. Several courts have considered the issue, at what precise point a particular state project becomes sufficiently "federalized" to become subject to the requirements of federal environmental legislation. James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F.Supp. 611 (E.D. Va. 1973); La Raza Unida v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971); and Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D. Cal. 1972). None of these cases have any real relevance here, because the initial prerequisites of a specific project for which federal funds have been or may be applied for are lacking. Since this project is solely state funded, there is no obligation upon the State of Connecticut requiring such an environmental evaluation as matter of federal statutory law; and it is upon this latter

concept that the plaintiffs' assertion of federal jurisdiction in this Court must fail.

Executive Order No. Sixteen, (Plaintiffs' Exhibit 7) states in part:

> "(1) That each state department, institution or agency shall review its policies and practices to insure that they are consistent with the State's environmental policy set forth at Section 22a-1 of the General Statutes."
>
> . . . .
>
> "6) That evaluations required by this Order shall be in accordance with guidelines to be promulgated by the Governor." (emphasis added).

No official guidelines or standards have ever been established or promulgated by the Governor, as prescribed by said Executive Order to make it operative. (Tr. 116-123). While the plaintiffs would assert that the Order takes effect immediately notwithstanding the absence of guidelines, the Court finds that such a conclusion is not legally tenable. Absent the establishment of standards for enforcement purposes, the Executive Order becomes liken unto an empty husk or an illusion. For purposes of effective administrative relief, it is a legal nullity and is incapable of judicial enforcement. Public Act 73-362, approved June 22, 1973, will become effective February 1, 1975. It requires the preparation and filing of environmental impact statements on all state projects affecting the environment and will ultimately replace Executive Order No. Sixteen. (Tr. 225-8). Connecticut, in the meantime, until

such standards are filed, may undertake local state projects financed solely with state funds, without being subject to the PACER requirements. (Plaintiffs' Exhibit 8A, at 22).

The plaintiffs claim that since the project might have qualified for federal funds, it should be subject to the requirements of federal environmental evaluation standards. That theory has no foundation in law and was raised in the case of River v. Richmond Metropolitan Authority, supra. There the court said:

> "Notwithstanding the fact that La Raza Unida declared a highway project to be federal early in the planning process, it most assuredly did not hold that a project could be federal where no federal participation had ever taken place. This is so even if the possibility existed for securing federal funds in the future." 359 F.Supp. at 634.

There has been no federal participation in this project. It does not appear on the Master Plan for Bradley International Airport filed several years ago. (Tr. 244). The State has sought no federal funds, or federal approval, nor has it reserved any federal option for any future application for federal funds to pay out this contract. Therefore, federal environmental law requires no environmental impact statement, as a condition precedent to the project's construction.

The plaintiffs have also tried to invoke federal jurisdiction under the citizens suit provisions of the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676. This law requires that the several states must meet national standards

for air quality within a few years. Under § 109 of the Act, 42 U.S.C. § 1857c-4, the Administrator is required to promulgate national primary ambient air quality standards and national secondary ambient air quality standards. The plaintiffs argue that this Court has jurisdiction, because the defendants are proceeding "as if the Clean Air Act were never passed by Congress."

The federal statute on which they would rely, 42 U.S.C. § 1857h-2(a) provides in pertinent part:

> ". . . [A]ny person who commences a civil action on his own behalf—
>
> (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard of limitation . . . ."

Jurisdiction to grant relief cannot be founded on the foregoing statutory provision, for the obvious reason that there is no emission standard [illegible]tion now in effect in Connecticut and the statutory policy embodied in Conn. Gen. Stat. § 22a-1 does not provide one. Citizens Association of Georgetown v. Washington, 370 F. Supp. 1101, 1107 (D. D.C. 1974); Wuillamey v. Werblin, 364 F.Supp. 237, 240 n.2 (D. N.J. 1973).

While the Clean Air Act may afford standing to the plaintiffs to have their alleged violation of a legally protected interest adjudicated[3/], they have no means to effect an

enforcement, absent the promulgation of statutorily enforceable standards. It is within the administrative planning requirements of the federal government to decline the approval of future federally funded projects for Connecticut until such time as the State has promulgated its own standards.

The history of Connecticut's efforts to comply with the Clean Air Act refutes the plaintiffs' assertion that the State has flaunted federal environmental controls. In March, 1972, pursuant to 42 U.S.C. § 1857c-5, Connecticut submitted an implementation plan which indicated that no additional regulation of automobile traffic would be needed to attain the national standard for automobile caused pollutants. That plan was accepted by the Administrator of the Environmental Protection Agency on May 31, 1972. (Tr. 326). In August, 1973, however, Connecticut was notified that its plan had been found inadequate and would have to be amended to include traffic strategies, (Tr. 333). Once filed, these proposed transportation control strategies will probably not become effective until 1977. (Tr. 340).

The plaintiffs argue that Connecticut should not have gone ahead with this project in light of the anticipated "magnitude of the traffic strategies that it would have to implement." The plaintiffs' reliance upon the case of Citizens

Association of Georgetown v. Washington, supra, is misplaced. There the Court found that while jurisdiction did not exist under 28 U.S.C. § 1857h-(2)(a), it did exist under § 1331. However, the circumstances of that case are distinguishable from what we have here.

In that case, a revised traffic control strategy had actually been promulgated by the Environmental Protection Agency (EPA). Its regulations provided for a pre-construction review of building complexes, such as those being challenged. The issue presented there was whether the regulations could be applied to developments begun in the hiatus between the effective date of the regulations and their actual promulgation. 370 F.Supp. at 1106.

The Court in that case found:

> ". . . that a substantial federal question exists as to whether the Clean Air Act of 1970 requires that the Maloney and Inland developments be reviewed during their construction to determine their potentiality for interfering with attainment and maintenance of the national standards . . . ."

But the opinion went on to note that:

> "[t]he Court lacks the evidentiary record and scientific expertise necessary to embark on a determination of whether the . . . projects portend a pattern of air pollution of a magnitude that will prevent the District from attaining the standards by 1977 . . . . [T]he Court notes in passing that estimating the increased air pollution generated from defendants' projects is a highly speculative undertaking . . . and may very well present judicially unmanageable standards." 370 F. Supp. at 1109.

In the case of Citizens Association, the traffic strategies and regulations required by federal law had at least been issued and had become effective. That is not the case here. Absent such federally required regulations and standards, the Court lacks any basis to assert jurisdiction under the Clean Air Act. The State's Chief Environmental Officer, Commissioner Dowd, when questioned as a witness on April 4, 1974 and asked if this proposed installation violated any federal or state law or regulation, responded: "To my knowledge it is not violating any State regulations, that we presently have authority over; and I do not know of any Federal regulations that it is presently violating." (Tr. 366).

The plaintiffs' final argument with respect to federal jurisdiction relies on 42 U.S.C. § 1983 and 28 U.S.C. § 1343 and consists of the broad constitutional claim that plaintiffs have a "state-created property right in a clean and healthful environment," which the defendants are destroying "without according them due process of law." The plaintiffs admitted in their argument presentation that to date no constitutional right to a clean environment has been recognized. Indeed, the failure of Congress in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et sequitur, to enact a proposed provision creating a substantive right to a healthful environment has led courts to decline to find within NEPA

the type of substantive property rights urged by the plaintiffs. Environmental Defense Fund v. Corp of Engineers, 325 F.Supp. 749, 755 (E.D. Ark. 1971); see also, Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971). However, the plaintiffs argue that the enactment of the Connecticut Environmental Protection Act of 1971, Conn. Gen. Stat. § 22a-14-20 creates that substantive right which has heretofore been lacking.

While it is true that the federal court has jurisdiction to redress the deprivation of property rights under 28 U.S.C. § 1343, Lynch v. Household Finance Corporation, 405 U.S. 538 (1971), the Connecticut Act does not bestow personal property rights in the environment on these plaintiffs. Section 22a-15 of the Connecticut General Statutes provides as a declaration of policy,

> "It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction."

Section 22a-16 implements this public policy by authorizing any person to sue in the State Superior Court to protect the environment, as a public trust. It provides in pertinent part:

> ". . . any person . . . may maintain an action in the superior court . . . against . . . any instrumentality or agency of the state or . . .

> any person . . . for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction."

The Connecticut statute thus reflects a growing trend among the states toward using the "public trust" doctrine as a vehicle for judicial enforcement of environmental standards.[4/] But the state statutory right of a citizen to sue to enforce in the state court a "public trust" is not the type of personal property right, which would give this Court jurisdiction under 28 U.S.C. § 1343. But even if such a personal property right did exist, the record affords no basis for plaintiffs' claim of "arbitrary" governmental action and lack of due process.

This Court is of the opinion that the exercise of federal jurisdiction in the present case would upset the deliberate balance, which has been struck between federal and state authority in the field of environmental protection. The procedures by which the People Mover Project was approved, and now claimed to be so arbitrary, as to violate the plaintiffs' rights to due process, might have been tested under the provisions of NEPA, if the project had involved "major federal action." (See 42 U.S.C. § 4332(2)(C) requiring Environmental Impact Statement). Since no federal action is involved here, it would be inappropriate to allow the plaintiffs to circumvent the limited jurisdiction created by the

federal environmental statutes by styling their claim as a civil rights action under § 1343.

In short, the Connecticut Environmental Protection Act does nothing to detract from the validity of the conclusion reached by the Fourth Circuit in Ely v. Velde, supra:

> "Appellants baldly attempt to stretch rights, protected by law against infringement by federal agencies only, to cover the states and their officers in disregard of the plainly limited character of the legislation . . . . The general concept of conservation and protection of the environment has, in the recent past, made vast advances, prompting the adoption of . . . NEPA and other legislation. But without any showing whatever, we are not free to lay upon the State . . . new obligations on constitutional grounds." 451 F.2d at 1139.

The Court's conclusion is further strengthened by the fact that the state law has specified adequate due process procedure, including both judicial and administrative review, which would appear to encompass precisely the type of action the plaintiffs seek to accomplish.[5/] It is not for a federal court to intrude on this procedure or to engage in the delicate balancing of interests called for by the state statute.[6/]

This Court in exercising its discretion will refrain from ruling upon the issues of state law raised in this case, because absent the Court's finding substantive federal statutory and constitutional issues, pendent jurisdiction should not be exercised.

> "Its justification lies in consideration of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Mine Workers v. Gibbs, 383 U.S. 715, 726 (1975).

Also see, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 811 (2d Cir. 1971).

The Court finds no reason or need to retain jurisdiction of this case to further develop and litigate the issues raised. See, Nationwide Amusements, Inc. v. Nattin, 452 F.2d 651 (4th Cir. 1971). Accordingly, the plaintiffs' complaint is dismissed for not stating a claim upon which relief can be granted, as provided under Rule 12(b)(6), Fed. R. Civ. P. SO ORDERED.

Dated at Hartford, Connecticut, this 23rd day of July, 1974.

T. Emmet Clarie
Chief Judge

FOOTNOTES

1/ Excerpt from the testimony of Deputy Commissioner Frederick C. Pease of the Bureau of Rail and Motor Carrier Services of the State Department of Transportation, Tr. 33-34.

2/ Commissioner Wood resigned July 27, 1973. (Tr. 233).

3/ See, Wuillamey v. Werblin, 364 F.Supp. 237, 240 (D. N.J. 1973):

> "Although the parties' contentions concern themselves almost exclusively with air pollution, there apparently does not as yet exist a legally protected interest, per se, in maintaining pollution free air. That these plaintiffs, as individuals, do possess sufficient standing to secure this court as a proper forum can, however, be descried from a reading of the policy and purposes of the Clean Air Act itself." Also see, Norwalk Core v. Norwalk Development Agency, 395 F.2d 920, 927 (2d Cir. 1968).

4/ See, J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 473 (1970); H. Johnson, The Environmental Protection Act of 1971, 46 Conn. Bar. J. 422 (1972); Michigan Environmental Protection Act of 1970, P.S. 127, Mich. Stat. Anno. §§ 14528(51)-14528(206); Ind. Acts of 1971, P.L. 182, Burns Ind. Stat. Anno. §§ 3-3501-3-3506.

5/ In addition to the action for declaratory and equitable relief available under Conn. Gen. Stat. § 22a-16, § 22a-13 provides for citizens complaints to the Council on Environmental Quality. And even in the cases of actions brought originally in Superior Court and remanded to any agency for administrative action, the court retains broad powers of review over the agency's decision, Conn. Gen. Stat. § 22a-18.

6/ Under Conn. Gen. Stat. § 22a-18, the Superior Court is empowered to protect the public trust in the environment from "unreasonable pollution, impairment or destruction." (Emphasis added). And the interaction between court and administrative agency described in § 18(b)-(d) is decidedly a matter best left to the State.

STATE OF CONNECTICUT

BY HIS EXCELLENCY

THOMAS J. MESKILL

GOVERNOR

EXECUTIVE ORDER NO. SIXTEEN

WHEREAS, it is the policy of the State of Connecticut to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state; and

WHEREAS, it is the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state; and

WHEREAS, it is the policy of the state to manage the basic resources of air, land and water to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations;

NOW THEREFORE, I, Thomas J. Meskill, by virtue of the authority vested in me by the Constitution and the General Statutes and in furtherance of the policy set forth at Section 22a-1, Connecticut General Statutes, Revision of 1971, do hereby Order and Direct:

1. That each state department, institution or agency shall review its policies and practices to insure that they are consistent with the State's environmental policy set forth at Section 22a-1 of the General Statutes;

2. That each state department, institution or agency responsible for the primary recommendation or initiation of actions which may significantly affect the environment shall in the case of each such action make a written evaluation of:

a. The consequences of the proposed action to the environment, including primary and secondary impacts on ecological systems;

b. Adverse environmental effects which cannot be avoided and irreversible and irretrievalbe commitments of resources should the proposal be implemented;

c. Alternatives to the proposed action.

3. That each evaluation required by Paragraph 2 shall include an analysis relating the costs and benefits of the proposal over the short term to the costs and benefits over the long term;

4. That actions which may significantly affect the environment shall include those projects directly undertaken by state departments, institutions or agencies, or funded in whole or in part by the state, which could have a major impact on the state's land, water, air or other environmental resources, or could serve short term to the disadvantage of long-term environmental goals;

5. That evaluations required by Paragraph 2 need not be prepared for projects for which environmental

laws or regulations, provided that all such statements shall be considered and reviewed as if they were prepared under this Order;

6. That evaluations required by this Order shall be in accordance with guidelines to be promulgated by the Governor;

7. That evaluations required by this Order and environmental statements otherwise required and prepared subsequent to this Order shall be submitted for comment and review to the Connecticut Council on Environmental Quality, the Department of Environmental Protection, and such other agencies as the guidelines may require, and these comments shall be forwarded to the State Planning Council; and

8. That the State Planning Council, or an appropriate subcommittee thereof, shall review all such evaluations and statements, together with the comments thereon, and shall make a written recommendation to the Governor regarding the proposed state action.

9. This Order shall take effect immediately.

Thomas J. Meskill

GOVERNOR

Filed this 4th day of October, 1972.

7/31

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CONNECTICUT TRANSPORTATION COALITION, STATE OF CONNECTICUT NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE CONFERENCE OF BRANCHES, CONNECTICUT RIVER ECOLOGY ACTION CORPORATION, and CHARLOTTE KITOWSKI, THOMAS SHARPLESS, BEN ANDREWS for themselves and all others similarly situated	)	
v.	)	CIVIL NO. H74-70
THOMAS J. MESKILL, GOVERNOR OF THE STATE OF CONNECTICUT, JOSEPH BURNS, COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF CONNECTICUT, AND NATHAN AGOSTINELLI, COMPTROLLER OF THE STATE OF CONNETICUT	)	

JUDGMENT

This cause came on for hearing by the Court, T. Emmet Clarie, Chief Judge, presiding, on Plaintiff's Motion for Injunctive Relief and Defendant's Motion to Dismiss the Complaint, and the Court having filed its ruling on July 23, 1974 denying Injunctive Relief and dismissing the Complaint for failure to state a claim upon which relief can be granted.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing; that the complaint be and is hereby dismissed and that the defendants recover the costs of action.

Dated at New Haven, Connecticut this 30th day of July, 1974.

Clerk, United States District Court

CIVIL DOCKET

TED STATES DISTRICT COURT

Jury demand date:

H-74-70

No. 106 Rev.

TITLE OF CASE	ATTORNEYS
CONNECTICUT TRANSPORTATION COALITION, STATE OF CONNECTICUT NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE CONFERENCE OF BRANCHES, CONNECTICUT RIVER ECOLOGY ACTION CORPORATION, and CHARLOTTE KITOWSKI, THOMAS SHARPLESS, BEN ANDREWS for themsleves and all others similarly situated	For plaintiff: Bruce Mayor (J 549 5040 190 Trumbull St. Hartford, Conn. 06103
VS	
THOMAS J. MESKILL, Governor of the State of Connecticut, JOSEPH BURNS, Commissioner of the Department of Transportation of the State of Connecticut, NATHAN AGOSTINELLI, Comptroller of the State of Connecticut	For defendant: Robert K. Killian, Attorney General Clement J. Kichuk, Assist. Atty General 90 Brainard Rd. Hartford, Conn. 06114 bl 566-3946

STATISTICAL RECORD	COSTS	DATE 1974	NAME OR RECEIPT NO.	REC.	DISB.
mailed	Clerk	2-28	B. Mayor	15 00	
		3/15	Deposit (G.F. 100869)		15 00
mailed	Marshal	8/26	Appeal	5 00	
		8/30	Deposit (G.F. 100869)		5 00
f Action: Action brought t to Title 42 USC §1983 eclaratory and injunc- lief; to enjoin defend- arose at: ants from eding with construction ple Mover" at the	Docket fee				
	Witness fees				
	Depositions				

DATE 1974	PROCEEDINGS	Date Order Judgment
3-28	1. Complaint filed.	
3-12	ORDER TO SHOW CAUSE WHY PRELIMINARY INJUCTION SHOULD NOT BE ISSUED, filed. Clarie, J. m 3/13/74 Attested copies of ORDER and copies of complaint handed to Marshal for service upon respondents. (Hearing on 3/19/74)	
3-19	2. Appearance of Clement J. Kichuk entered for three defendants.	
"	HEARING on Preliminary Injunction to be heard on 4/2/74.	
3-21	3. Marshal's return showing service on defendants.	
3-28	4. Notice of Motion and Motion to Dismiss Complaint filed.	
"	5. Brief of Defendants in Support of Motion to Dismiss.	
3-29	6. Notice of Motion & Motion to Quash Subpoena filed by Atty for Meskill.	
4-2	HEARING on Order to Show cause why preliminary injunction should not be issued. Motion to Quash subpoena GRANTED. Hearing on motion to dismiss. Judgment reserved on motion to dismiss. Two Pltf. witnesses sworn and testified. Exhibits, 1, 2, 3, 4, & 5 filed. Court adjourned at 5:05 until tomorrow., at 10.	
4-3	HEARING CONTINUES on Order to Show Cause. One Pltf witness sworn and testified. Pltf. exhibits 7,8-A , 8-B, 9, 10, 10 A filed. Def. Exhibit A filed. Case continued to tomorrow at 10:00a m.	
4-4	HEARING ON ORDER TO SHOW CAUSE CONTINUES Pltf. witness, J. F Shugrue previously sworn resumes stand and continues testimony. Six (6) Plaintiff's witnesses sworn and testified, Pltf. exhibits 11, 12, 13, 14, 15, 16, 17, and 18 filed, Defendants exhibits, B, C, D, E, F, and G filed. Atty Mayor renews objection Motion to quash , NO RULING. Briefs to be filed by Pltf. on 4/18/74 and by DEF. on 4/25/74, Request denied on Atty Mayor application to reconsider ruling on motion to Quash, Court adjourned at 4:50 until tomorrow at 10:00 a.m,	
4-9	CONTINUED HEARING for purpose of Exhibit 18. Pltf. witness J. Shugrue resumes stand and testies. One def. witness sworn and testified.	
4-26	7Plaintiff's Memorandum in Support of Their Motion for Preliminary Injunction filed.	
5-7	8. Request for Extension of Time to File Brief is extended to 5/10. GRANTED Clarie, J.m5-7-74 Copies mailed to counsel.	
5-10	9. Defendants Proposed Findings of Fact and Conclusions of Law filed.	
6-20	10. Transcript of of Hearings of 4/2,3,4 &9, 1974 filed. Spencer, R.	
7-23	10. Ruling on Plaintiffs' Motion for Injunctive Relief and Defendants (DISMISSED) Motion to Dismiss. filed. Clarie, J. m 7-25-74. Copies mailed to counsel of record.	
7-30	11. JUDGMENT entered. Markowski, C, m7-30-74. Copies mailed to counsel of record.	
8-26	12. Notice of Appeal filed. Copies of notice and docket mailed to New Haven and the U.S. Court of Appeals and Atty. General and to Atty. Mayor. Civil Appeals Management Forms C & D , mailed to counsel.	
8-26	13. Bond for Costs, filed.	
9-24	File mailed to New Haven.	

A True Copy
Attest:

DOMINIC A. MARKOWSKI
Clerk, U. S. District Court

By _____
Deputy Clerk

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